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No. 87-1354

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
AND BRIEF OF CAPITAL CITIES/ABC, INC., DOW
JONES & COMPANY, INC., FOX TELEVISION STATIONS
INC., THE HEARST CORPORATION, NATIONAL
BROADCASTING COMPANY, INC., NEWSWEEK, INC.,
THE NEW YORK TIMES COMPANY, TIME, INC., AND
THE WASHINGTON POST AS AMICI CURIAE IN
SUPPORT OF PETITIONERS**

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March 14, 1988

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Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post (“Amici”) move, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file a brief as *amici curiae* in support of petitioners. Amici have sought written consent from petitioners and respondent and have obtained consent from petitioners; respondent has not consented. Petitioners’ written consent has been filed with the Clerk of the Court.

Amici constitute a broad cross-section of the news media in this country and are actively involved in the collection and dis-

semination of news. Amicus Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers and magazines. Amicus Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, and a number of community daily newspapers through its Ottaway Newspapers, Inc. subsidiary. Amicus Fox Television Stations Inc. owns and operates seven television stations in major metropolitan areas throughout the country.

Amicus The Hearst Corporation is a diversified, privately held company that publishes newspapers, magazines, and hard-cover and soft-cover books, and owns and operates a leading feature syndicate, television and radio broadcasting stations, and cable television systems. Amicus National Broadcasting Company, Inc. owns television stations and operates a national television network. Amicus Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

Amicus The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with nationwide circulation, and some 35 regional newspapers; it also owns radio and television properties. Amicus Time, Inc. is the largest publisher of general circulation magazines in the United States; it publishes *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Life*. Amicus The Washington Post is a daily newspaper of general circulation published in the Washington, D.C. metropolitan area, with a daily circulation of nearly 800,000 and a Sunday circulation of approximately 1,100,000.

This petition raises important questions concerning the constitutionality of presumed and punitive damages in defamation cases. Amici seek to address only these constitutional questions. Each Amicus has been a defendant in defamation suits seeking substantial presumed and punitive damages, and each has had to face the threat of expensive and time-consuming litigation when making editorial decisions. Consequently, Amici have a

vital interest in the standards to be applied to awards of defamation damages. Amici's close familiarity with the questions here at issue, and their broad perspective on the effects of presumed and punitive damages, enable them to contribute to this Court's consideration of petitioners' petition.

Dated: New York, New York
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WASHINGTON POST AS AMICI CURIAE IN SUPPORT
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Statement of Interest

A motion for leave to file this brief, brought by Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting

Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post ("Amici"), is attached to the front of this brief pursuant to Rule 36 of this Court's Rules. That motion contains a statement of Amici's interest in this action.

Reasons for Granting the Writ

This case squarely presents a question left open by this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985): under what circumstances, if any, may a public plaintiff¹ recover presumed and/or punitive damages in a defamation action based on statements involving matters of public concern?

Gertz held that a *private* plaintiff could not recover presumed or punitive damages for allegedly defamatory statements involving matters of *public* interest ("public speech") without "at least" proving the defendant's "knowledge of falsity or reckless disregard for the truth," 418 U.S. at 349; *Dun & Bradstreet* allowed a private plaintiff to obtain presumed and punitive damages on a showing of something less than "actual malice" where the alleged defamation involved a matter of purely *private* concern. These holdings leave open the constitutional standards applicable in a *public* plaintiff's defamation action involving speech of substantial *public* interest, an issue with which numerous courts and commentators have grappled for many years.²

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- 1 This brief uses the term "public plaintiff" to refer collectively to public officials and public figures. There appears to be no dispute about respondent's public-figure status. See App. at 16a. (Citations to "App." refer to the Appendix to petitioners' Petition for Certiorari.)
 - 2 See, e.g., *Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., with Marshall, Blackmun, and Stevens, JJ., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-77 (1971) (Harlan, J., dissenting); *id.* at 82-86 (Marshall, J., with Stewart, J., dissenting); R. Sack, *Libel*,

The instant case presents that open question in a particularly crystallized form, for the libel award in issue consists exclusively of presumed damages (\$1,000,000) and punitive damages (\$2,050,000), all awarded to a public plaintiff that had indisputably failed to prove any cognizable injury to its business or reputation. The need to address the constitutionality of such a result is compelling, in light of the serious difficulties that presumed and punitive damages pose to First Amendment values. Punitive damages impermissibly inflict punishment for speech about public matters without directly serving the countervailing state interest in redressing injury to reputation. Presumed damages, whose existence is based on the questionable assumption that actual injury is impossible to prove, impermissibly encourage juries to award large sums of money where there is no evidence of any injury at all. These standardless damage rules accord juries largely uncontrolled discretion to punish unpopular speech and are largely responsible for the chaotic and unpredictable state of defamation litigation in trial courts throughout the country.

Slander, and Related Problems 346-54 (1980); Anderson, "Libel and Press Self-Censorship," 53 Tex. L. Rev. 422, 477 (1975); Arkin & Granquist, "The Presumption of General Damages in the Law of Constitutional Libel," 68 Colum. L. Rev. 1482 (1968); Goodale, "Damages in Defamation Actions," *Damages in Tort Actions*, vol. 5, §§ 45.21[2][b] & [4] (1985); Hill, "Defamation and Privacy Under the First Amendment," 76 Colum. L. Rev. 1205, 1251-53 (1976); Report, Committee on Communications Law, "Punitive Damages in Libel Actions," 42 Record of Ass'n of Bar of City of N.Y. 20 (Jan./Feb. 1987) ("Report"); Sack & Tofel, "First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages," 90 Dick. L. Rev. 609 (1986); Note, "The Constitutionality of Punitive Damages in Libel Actions," 45 Fordham L. Rev. 1382 (1977); Note, "Punitive Damages and Libel Law," 98 Harv. L. Rev. 847 (1985); Note, "Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech," 64 Yale L.J. 610 (1955); Recent Cases, "Punitive Damages in Defamation Actions Brought by Public Figures Chill First Amendment Rights and Are Unconstitutional Unless Narrowly and Necessarily Promoting Compelling State Interest," 28 Vand. L. Rev. 887 (1975).

To vindicate the “robust political debate encouraged by the First Amendment,” and to insure for freedom of expression the “breathing space” that it needs to survive and flourish, *Hustler Magazine, Inc. v. Falwell*, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 23, 1988), this Court should grant certiorari and hold both presumed and punitive damages unconstitutional in public-plaintiff defamation actions involving public speech.

I. THE FIRST AMENDMENT DEMANDS HEIGHTENED SENSITIVITY TO THE INTEREST IN PROTECTING SPEECH ABOUT PUBLIC PLAINTIFFS AND PUBLIC ISSUES WHEN ESTABLISHING RULES OF DAMAGES.

This Court has acknowledged the “tension [that] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.” *Gertz*, 418 U.S. at 342. On one hand, the First Amendment interest in fostering freedom of expression requires the protection of certain falsehoods because such statements are inevitable in free debate, *Hustler Magazine*, 56 U.S.L.W. at 4181, and because “punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,” *Gertz*, 418 U.S. at 340. On the other hand, the Court has recognized “[t]he legitimate state interest . . . [in] compensat[ing] . . . individuals for the harm inflicted on them by defamatory falsehood.” *Id.* at 341.

To accommodate these competing concerns, the Court has held that the relative values of robust debate and of compensating individuals for reputational injury vary with the status of the particular plaintiff and with the nature of the particular speech at issue. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Speech concerning public plaintiffs and matters of public interest has been treated as particularly deserving of protection. *Compare New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964) (public plaintiff cannot establish liability unless he can prove with “convincing clarity” that complained-of statement was false and was made with “actual malice”) with *Philadelphia Newspapers*, 475 U.S.

at 775, and *Gertz*, 418 U.S. at 347 (*private* plaintiff can establish liability on lesser showing). Heightened protection for this speech has been justified because (a) the public has a validly stronger interest in information about public plaintiffs and their activities, (b) public plaintiffs usually enjoy significant access to the media to express their views and rebut allegedly defamatory statements, and (c) persons who have entered the public arena must be deemed to have accepted "the risk of closer public scrutiny than might otherwise be the case." *Gertz*, 418 U.S. at 344.

For the same reasons, rules of presumed and punitive damages must be considered with heightened sensitivity to First Amendment values in cases involving public plaintiffs and public speech. The specter of such damages casts a separate and additional chill on robust debate about public matters, wholly apart from the possibility of having to defend against assertions of liability. Such damages pose the threat that a misstep will lead to crippling monetary awards wholly out of proportion to any actual injury.³ That threat unquestionably affects editorial judgments respecting the publication of newsworthy material. Massing, "The Libel Chill: How Cold Is It Out There?," *Colum. Journalism Rev.* 31 (May/June 1985). At the same time, presumed and punitive damages are less appropriate than in private-plaintiff cases, because public plaintiffs have a less legitimate interest in shielding themselves from the attentions of the press and are more likely to be able to mitigate or repair any harm to their reputation. *Gertz*, 418 U.S. at 344.

This Court has determined that different types of plaintiffs and speech warrant different rules governing awards of presumed and punitive damages. Compare *Dun & Bradstreet*, 472 U.S. at 761 (*private* plaintiff in *private*-speech case may recover presumed and punitive damages without proof of "actual malice") with *Gertz*, 418 U.S. at 349 (*private* plaintiff suing on the

³ Indeed, many states, as a matter of public policy, do not permit insurance coverage of punitive damages. See, e.g., *Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979).

basis of *public* speech may *not* recover such damages without "at least" such proof). Similar sensitivity to the special First Amendment interests implicated in cases involving public plaintiffs and public speech requires an absolute prohibition against presumed and punitive damages, even on a showing of "actual malice."

II. THE PURPORTED INTERESTS SUPPORTING PUNITIVE DAMAGES FOR PUBLIC DEFAMATION PLAINTIFFS ARE INSUFFICIENT TO OVERCOME THE FIRST AMENDMENT INTEREST IN PROHIBITING THEM.

Punitive damages in the public-plaintiff/public-speech defamation context cannot be squared with the First Amendment interest in according heightened protection to such speech.⁴ In attempting to resolve the tension between the common law of defamation and the First Amendment, this Court has identified only a single state interest that can justify imposing liability for allegedly defamatory speech: the interest in compensating defamed individuals for actual injury to reputation. By its nature, that interest "extends no further than compensation for actual injury." *Gertz*, 418 U.S. at 349. As this Court has observed, "States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.*

Punitive damages do not satisfy this interest. They are not compensation for injury. Indeed, they do not focus on the plaintiff at all. Rather, such damages "are private fines levied

4 Many judges and commentators have recognized the unconstitutionality of punitive damages, at least in cases involving public plaintiffs and public speech. See, e.g., *Rosenbloom*, 403 U.S. at 82-86 (Marshall, J., dissenting); Anderson, *supra*, 53 Tex. L. Rev. at 477; Hill, *supra*, 76 Colum. L. Rev. at 1253; Report, *supra*, at 24, 42-45; Note, *supra*, 64 Yale L.J. at 612-13; see also *Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., dissenting); cf. *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 169 (1975) (rejecting punitive damages "in any defamation action, on any state of proof").

by civil juries to punish reprehensible conduct and to deter its future occurrence.” *Id.* at 350.

Damages that serve only the aims of punishment and deterrence are extremely dangerous in the First Amendment context, because they exact punishment for speech, seek to prevent or influence future expression (and often undesirably succeed in that effort), and impose financial burdens on the press far out of proportion to any actual injury. Such damages also are particularly problematic because they permit jurors, whose discretion “is limited only by the gentle rule that [such damages] not be excessive,” to “assess punitive damages in wholly unpredictable amounts . . . [a]nd . . . use their discretion selectively to punish expressions of unpopular views.” *Id.*; accord, *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting). As this Court recently reaffirmed, the First Amendment prohibits the imposition of damages designed to punish unpopular expression. See, e.g., *Hustler Magazine*, 56 U.S.L.W. at 4182 (barring imposition of liability for “outrageousness” or offensiveness, even if it intentionally causes emotional harm).

The constraints that punitive damages place on robust debate are very real and substantial, because juries have demonstrated a pronounced tendency in recent years to award punitive damages in the overwhelming majority of defamation cases, and in staggering amounts.⁵ Those constraints should not be permitted

5 In a two-year period between 1984 and 1986, for example, libel juries awarded punitive damages in nearly two-thirds of all damage cases. Nearly one quarter of those awards amounted to \$1 million or more, with the average award exceeding \$600,000. Libel Defense Resource Center, “LDRC Litigation Study #9—Defamation Trials, Damage Awards and Appeals III: Two-Year Update (1984-86)” at 3, 13, 19 (1988) (“LDRC Study”). Although the average punitive-damages award was reduced very substantially after post-trial motions and appeals, *id.* at 21-30, these reductions have not eliminated either the enormous amounts of time, energy, and money that defendants have spent to litigate cases through the appellate stage or the incremental chilling of free expression caused by the well-publicized pattern of libel verdicts. See Massing, *supra*. Indeed, this high rate of rejection of

when, as here, (a) the speech relates to public plaintiffs (in whom the public legitimately has the most interest) and matters of public concern (which are deemed most worthy of protection), and (b) the burdens are not tailored in any reasonable sense to the interest in redressing actual injury to reputation. The Court should declare punitive damages in this context unconstitutional.

III. PRESUMED DAMAGES IN PUBLIC-PLAINTIFF/ PUBLIC-SPEECH DEFAMATION CASES ALSO VIOLATE THE FIRST AMENDMENT.

The accommodation between First Amendment interests in robust speech and the state interest in redressing reputational injury similarly requires a rule prohibiting presumed damages in public-plaintiff/public-speech defamation cases. Defamation is the only common law tort that permits an award of damages without any evidence of actual loss. *Gertz*, 418 U.S. at 349. This Court has acknowledged the danger inherent in permitting such awards without proof:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

Id. Although the Court has suggested that it might permit a *private* plaintiff to recover presumed damages upon proof of “actual malice,” *id.*, the heightened interests in public-plaintiff/public-speech cases call for a stricter rule abandoning such damages altogether. *See, e.g., Rosenbloom*, 403 U.S. at 82-86

awards vividly illustrates the standardlessness with which juries exercise their discretion to award punitive damages—a discretion that “unnecessarily exacerbates the danger of media self-censorship . . .” *Gertz*, 418 U.S. at 350.

(Marshall, J., dissenting); Arkin & Granquist, *supra*, 68 Colum. L. Rev. at 1488.

Presumed damages, by definition, are inherently standardless, for they exist in the complete absence of proof of injury. The result of this standardlessness has been chaos in the courts, with trial and appellate courts consistently slashing or overturning jury verdicts⁶ while often confessing the arbitrariness of their own review. The instant case vividly illustrates the problem. In picking the round number of \$1,000,000 for presumed damages, the Court of Appeals admitted that its assessment of injury was "very inexact," "somewhat arbitrary," "difficult at best," and "speculati[ve]." App. at 41a, 47a. Other courts have made similar confessions. See, e.g., *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987). Such guesswork awards are particularly offensive in cases involving public plaintiffs and public speech.

The state interest in compensating plaintiffs for actual injury to reputation—the only interest that the Court has recognized as offsetting the press's First Amendment rights—can be fully protected without permitting awards of presumed damages in public-plaintiff/public-speech cases. This Court has defined "actual injury" as including not only "out-of-pocket loss" but also "impairment of reputation and standing in the community," even in the absence of "evidence which assigns an actual dollar value to the injury." *Gertz*, 418 U.S. at 350. That approach to defining injury fully satisfies the interest in assuring fair compensation for harm.

Moreover, any actual injury suffered by a public plaintiff such as respondent can readily be proved by conventional evidentiary means, making a rule permitting presumed damages entirely unnecessary. Respondent could have proved special

6 See LDRC Study at 4, 21-30 (only 20% of defamation damage awards remained intact after appeal).

7 The court also incomprehensibly explained that \$1,000,000, "on the facts of this case," was merely "sizable" but not "substantial." App. at 46a.

damages (if it suffered any) by introducing evidence of lost sales or costly disruption within its organization. It could have proved general damage (if any) to its reputation by presenting direct evidence from customers, or expert testimony about public opinion polls, as is frequently done in other kinds of cases. See, e.g., *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875 (2d Cir. 1986) (relying on survey evidence to prove public's state of mind on issue of product similarity).⁸ Indeed, proof of reputational injury through such mechanisms should be *easier* for public plaintiffs who seek to establish damage as a result of widely circulated news reports than for private plaintiffs.

Presumed damages are not subject to any reasonable limitations. They are in no sense necessary. They unwarrantedly permit recovery of unsupportable and arbitrarily selected sums by public plaintiffs who have presented *no* evidence of actual injury. This Court should reject such damages as inconsistent with profound countervailing First Amendment considerations.

8 Although the court below rejected respondent's evidence of emotional harm "because a corporation is not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel," App. at 40a n.10, an individual plaintiff could easily enlist psychiatrists to prove any such harm.

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the decision below, and should declare presumed and punitive damages unconstitutional in defamation actions brought by public plaintiffs and involving speech about matters of public interest.

Dated: March 14, 1988

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I, James C. Goodale, a member of the Bar of this Court, hereby certify that I caused three copies of the annexed Motion for Leave to File Brief as Amici Curiae and Brief of Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post as Amici Curiae in Support of Petitioners, to be served on March 14, 1988, by express mail (postage prepaid) and hand delivery, respectively, upon the following counsel:

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